Office - Supreme Court, U.S.
FILED
JAN 11 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-552

In the Supreme Court of the United States

OCTOBER TERM, 1983

DEWEY T. NABORS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

BRENDA GRUSS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court erred in admitting evidence of petitioner's silence in response to a private insurer's inquiry.

2. Whether the district court abused its discretion in admitting similar crimes evidence.

3. Whether the district court erred in ruling that petitioner had not made a claim sufficient to require the government to affirm or deny use of illegal electronic surveillance.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Baker, In re, 680 F.2d 721 8

Doyle v. *Ohio*, 426 U.S. 610 4

Evans, In re, 452 F.2d 1239, cert. denied, 408 U.S. 930 8

Fletcher v. *Weir*, 455 U.S. 603 4

Grand Jury Proceedings, In re, 643 F.2d 226 9

Grand Jury Proceedings, In re, 664 F.2d 423, cert. denied, 455 U.S. 1000 8

Grosso v. *United States*, 390 U.S. 62 4

Jenkins v. *Anderson*, 447 U.S. 231 ..... 3, 4-5

Lefkowitz v. *Turley*, 414 U.S. 70 4

Marchetti v. *United States*, 390 U.S. 39 4

Millow, In re, 529 F.2d 770 ..... 7, 8

Rogers v. *United States*, 340 U.S. 367 4

United States v. *Alvillar*, 575 F.2d 1316 9

United States v. *Beechum*, 582 F.2d 898, cert. denied, 440 U.S. 920 7

United States v. *Caro*, 637 F.2d 869 4

Page

Cases—Continued:

United States v. *Fearns*, 501 F.2d 486 6

United States v. *Fierson*, 419 F.2d 1020 6

United States v. *Giese*, 597 F.2d 1170, cert. denied, 444 U.S. 979 4

United States v. *Hoosier*, 542 F.2d 687 4

United States v. *Kilbourne*, 559 F.2d 1263, cert. denied, 434 U.S. 873 4

United States v. *King*, 560 F.2d 122, cert. denied, 434 U.S. 925 4

United States v. *Powell*, 587 F.2d 443 5

United States v. *Ring*, 513 F.2d 1001 6

United States v. *Roberts*, 619 F.2d 379 6

United States v. *Rubin*, 559 F.2d 975, judgment vacated and remanded on other grounds, 439 U.S. 810, rev'd in part on other grounds on remand, 591 F.2d 278, cert. denied, 444 U.S. 864 8

United States v. *See*, 505 F.2d 845, cert. denied, 420 U.S. 992 8

United States v. *Sprengel*, 103 F.2d 876 4

United States v. *Toscanino*, 500 F.2d 267 8

United States v. *Tucker*, 526 F.2d 279, cert. denied, 425 U.S. 958 7-8

United States v. *Vielguth*, 502 F.2d 1257 8

Page

Constitution, statutes and rules:

U.S. Const. Amend. V 3
18 U.S.C. 3504 ..... 3, 7, 8
21 U.S.C. 841 2
21 U.S.C. 846 2
21 U.S.C. 952 2
21 U.S.C. 960 2
21 U.S.C. 963 2
Fed. R. Evid.:
Rule 403 7
Rule 404(b) 5

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-552

DEWEY T. NABORS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 707 F.2d 1294.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1983. A petition for rehearing was denied on August 15, 1983 (Pet. App. A17-A18). The petition for a writ of certiorari was filed on October 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of conspiracy to import marijuana and methaqualone (Count I); conspiracy to possess marijuana and methaqualone with intent to distribute (Count II); importing marijuana (Count III); importing methaqualone (Count IV);

possession of marijuana with intent to distribute (Count V); and possession of methaqualone with intent to distribute (Count VI), in violation of 21 U.S.C. 841, 846, 952, 960, and 963 (Pet. 4). Petitioner was sentenced to 15 years' imprisonment to be followed by a five-year special parole term (R. 87). The court of appeals affirmed (Pet. App. A1-A16).

1. The evidence at trial showed that in February 1980, petitioner arranged to lease an airplane from Associated Auto Leasing, Inc., for use in a drug smuggling operation. Petitioner obtained an insurance policy on the airplane that showed him as an insured and lessee of the plane (Tr. 152; GX 2). Petitioner also contacted Mike Warner and arranged to have him fly the plane from South America to Georgia with a 900 pound load of marijuana in exchange for $50,000 (Tr. 278-280). In 1976, Warner had twice flown marijuana from South America to Georgia for petitioner (Tr. 247-248, 262-265).

On Saturday, April 12, 1980, petitioner met Warner in Colombia, South America, and assisted him in loading marijuana and methaqualone onto the airplane (Tr. 289-292). Warner flew the drugs to Georgia on April 13, but weather problems prevented him from landing on the designated strip (Tr. 293-294). Instead, Warner landed near Unadilla, Georgia, where he set the airplane on fire (Tr. 294-295; GX 10A-10L). Dooly County, Georgia officials discovered the airplane and its cargo, and arrested Warner (Tr. 52-59, 94-96). Warner implicated petitioner and was the government's main witness at trial.

Following destruction of the airplane, the insurance company, pursuant to its policy with petitioner, sent him a letter requesting his cooperation in the company's investigation (GX 7A). Although he received this letter (Tr. 170-175), petitioner never responded to it. In fact, petitioner made no attempt to contact the insurance company after the loss of the airplane (Tr. 166-167).

2. Two weeks before trial petitioner moved under 18 U.S.C. 3504 to compel the government to affirm or deny the existence of electronic interceptions of petitioner's international phone conversations (Pet. App. A34-A36). Petitioner's motion was supported by an affidavit from his attorney stating that government documents revealed a policy of the National Security Agency (NSA) to monitor international telephone conversations, and by his own affidavit, which said, " '[B]ased on NSA's policy of surveillance, I am informed and believe, and thereon allege, that some or all of my aforementioned telephone conversations with persons located in Central and South America, were, in all likelihood, intercepted by the United States of America' " (Pet. App. A15-A16). The district court denied petitioner's motion (Pet. App. A33).

ARGUMENT

1. Petitioner contends (Pet. 10-18) that it was error to admit in the government's case-in-chief evidence of petitioner's failure to respond to the insurance company inquiry, despite petitioner's representation that he would not testify. The district court properly admitted this evidence.

The voluntary decision to speak or remain silent in the absence of any official compulsion does not implicate the Fifth Amendment. See, *e.g.*, *Jenkins* v. *Anderson*, 447 U.S. 231, 240 (1980). Petitioner's silence came in response to a private insurer's inquiry, not to governmental interrogation. The insurer's inquiry occurred one and a half years before petitioner's indictment. Had petitioner made statements to his insurance company at that time, the prosecution undoubtedly could have introduced them free of any conceivable Fifth Amendment claim of compelled self-incrimination. Just as the prosecution could have introduced petitioner's statements as not compelled by state action, it permissibly introduced evidence of his silence. Cf.

United States v. *Giese*, 597 F.2d 1170, 1196 (9th Cir.), cert. denied, 444 U.S. 979 (1979) (admission of defendant's pre-arrest failure to deny co-conspirator's lawyer's statement that he knew defendant was a participant in crime); *United States* v. *King*, 560 F.2d 122, 134-135 (2d Cir.), cert. denied, 434 U.S. 925 (1977) (evidence that defendant remained silent in response to corporate official's criticism); *United States* v. *Kilbourne*, 559 F.2d 1263, 1265 (4th Cir.), cert. denied, 434 U.S. 873 (1977) (testimony concerning defendant's silence when witness asked how he knew about victim's death before body was found and before police released news of murder); *United States* v. *Hoosier*, 542 F.2d 687 (6th Cir. 1976) (evidence of defendant's silence when his girl friend told a third party about proceeds from bank robbery).

Petitioner makes no suggestion that the government was somehow responsible for the insurance company's inquiry, or that "the government had induced [his] silence" in any way. *Fletcher* v. *Weir*, 455 U.S. 603, 606 (1982). This case is thus clearly distinct from all those on which he relies for his Fifth Amendment claim. *Doyle* v. *Ohio*, 426 U.S. 610 (1976) (impeachment by post-arrest silence immediately following *Miranda* warnings not permitted); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) (failure to testify before grand jury); *Marchetti* v. *United States*, 390 U.S. 39 (1968) (failure to register and pay wagering tax); *Grosso* v. *United States*, 390 U.S. 62 (1968) (failure to pay wagering tax); *Rogers* v. *United States*, 340 U.S. 367 (1951) (failure to testify before grand jury); *United States* v. *Caro*, 637 F.2d 869 (2d Cir. 1981) (defendant's silence during Customs inspector's examination of his suitcase); *United States* v. *Sprengel*, 103 F.2d 876 (3d Cir. 1939) (defendant's failure to answer questionnaire sent by postal inspector).[1]

---

[1]For the same reason, this case does not present the question, left open in *Jenkins* v. *Anderson*, 447 U.S. at 236 n.2, "whether or under

2. Petitioner contends (Pet. 18-23) that because he did not contest the issue of intent, the trial court erred when it admitted evidence of prior similar acts under the "intent" exception to Fed. R. Evid. 404(b). The court of appeals properly rejected this contention.

Petitioner's counsel in fact urged in his closing argument that petitioner lacked the requisite intent to justify conviction (Pet. App. A13). He also attempted to show through cross-examination that petitioner had not acted in a furtive manner indicative of criminal conduct. Petitioner concedes (Pet. 19 n.15) that this line of cross-examination was intended to contradict the government's evidence that he had *participated* in the conspiracy. There was, however, no dispute that petitioner in fact leased the aircraft and undertook associated responsibilities, and permitted Warner to fly the plane. Thus, petitioner's contention that he did not participate in the conspiracy is in effect a claim that while he undertook certain acts linking him to the other conspirators, he did not share their criminal intent. Contrast *United States* v. *Powell*, 587 F.2d 443 (9th Cir. 1978) (defendant charged with conspiracy to possess marijuana with intent to distribute contended that he did not supply the marijuana possessed by co-conspirators). Since, as the court of appeals found (Pet. App. A13), the prior crimes evidence was probative of petitioner's intent, and was not unfairly prejudicial, the trial judge did not abuse his discretion in admitting it into evidence.

---

what circumstances prearrest silence may be protected by the Fifth Amendment." In *Jenkins* the issue was whether the government could introduce evidence that the defendant had failed to report a stabbing to the police. Here the evidence in question simply concerned petitioner's unexplained decision to forfeit coverage on his insurance policy (see GX 7A).

In *United States* v. *Roberts*, 619 F.2d 379, 383 (1980), the Fifth Circuit held that in a conspiracy case where the defendant pleads not guilty, prior crimes evidence is admissible in the government's case-in-chief unless the defendant affirmatively removes the issue of intent. Insisting that the court of appeals relied only upon *Roberts* to rule the prior crimes evidence here admissible, petitioner points to a purported conflict between *Roberts* and cases in other circuits (Pet. 20-22). But as we noted above, the evidence here was admissible quite apart from the holding in *Roberts*, since petitioner's intent was in fact a contested issue. In any event, the cases petitioner relies upon are quite different from *Roberts* and from the instant case. In conspiracy cases, such as *Roberts*, the element of intent is often difficult to prove (619 F.2d at 383). The cases cited by petitioner, by contrast, involved substantive offenses, the requisite intent for which could be inferred from the nature of the act or from other evidence presented at trial. See *United States* v. *Ring*, 513 F.2d 1001, 1008 (6th Cir. 1975) (in prosecution for mailing threatening letters, if act were proven, intent would naturally be inferred); *United States* v. *Fearns*, 501 F.2d 486, 491 (7th Cir. 1974) (in prosecution for forgery, "[i]t is hardly conceivable that, if those acts were done, they were done with innocent intent"); *United States* v. *Fierson*, 419 F.2d 1020, 1023 (7th Cir. 1969) (in prosecution for impersonating an FBI agent, the "facts * * * did not raise even the slightest suggestion that Fierson did the physical act charged but without the requisite willfulness and intent").

Petitioner claims (Pet. 22-23) that in any event the rule in *Roberts* presents the defendant with an unconstitutional choice: either stipulate to the issue of intent, or suffer the introduction of clearly prejudicial evidence without regard to the government's need for such evidence. But the fact that the court of appeals has permitted a criminal defendant an

opportunity to avoid introduction of probative, inculpatory, and otherwise admissible evidence if he elects to stipulate cannot possibly violate the defendant's rights, and of course extrinsic offense evidence may be admitted only if its probative value is not substantially outweighed by its undue prejudice. Fed. R. Evid. 403; *United States* v. *Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). In this case the court of appeals properly concluded (Pet. App. A13-A14) that it was not.

3. 18 U.S.C. 3504 provides that upon a defendant's claim that evidence is inadmissible because it is the fruit of unlawful electronic surveillance, the government shall affirm or deny the alleged unlawful act. Petitioner argues (Pet. 23-28) that the district court and the court of appeals erred in ruling that his allegations were insufficient to require the government to affirm or deny the use of illegal electronic surveillance to obtain evidence in this case. This claim is without merit.

If allusion to the statistical possibility that the government monitored some of petitioner's international telephone conversations sufficed to constitute a "claim" under Section 3504, any defendant who makes international calls prior to trial could delay criminal proceedings pending discovery of information responsive to his claim. Section 3504 "was not intended, however, to transform an investigation by the government into an investigation of the government where claims of illegality lack substantial support." *In re Millow*, 529 F.2d 770, 774 (2d Cir. 1976). Consequently, the rule that a defendant's "mere assertion" of illegal electronic surveillance is sufficient to trigger the government's obligation to affirm or deny has been understood to require "at a minimum, a positive statement that unlawful surveillance has taken place." *United States* v. *Tucker*, 526 F.2d 279, 282 (5th Cir.), cert. denied, 425 U.S.

958 (1976). See also *In re Millow*, 529 F.2d at 774 (a "colorable basis"); *In re Baker*, 680 F.2d 721 (11th Cir. 1982); *United States* v. *Rubin*, 559 F.2d 975 (5th Cir. 1977), judgment vacated and remanded on other grounds, 439 U.S. 810 (1978), rev'd in part on other grounds on remand, 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864 (1979).

Since petitioner's allegations expressed only a *belief* of likely interception, and since petitioner did not allege that any of the evidence against him was the fruit of unlawful interception, his suppositions clearly fell short of the minimum necessary to trigger a governmental obligation to respond to his claim.[2]

Even if petitioner's allegations were sufficient to constitute a "claim" under 18 U.S.C. 3504, the government's response was adequate to justify denial of petitioner's motion to suppress. The sufficiency of the government's denial of illegal electronic surveillance is dependent upon the specificity of the movant's allegations. See, *e.g.*, *In re Grand Jury Proceedings*, 664 F.2d 423, 427 (5th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); *United States* v. *See*, 505 F.2d 845, 856 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975). Here the Assistant United States Attorney stated that "the evidence in this case is not derived from any monitoring of any kind. I've talked to every agent involved. I've read every report I could find on [petitioner]" (Pet.

---

[2]Petitioner argues that the rule in the Fifth and Eleventh Circuits, and by implication the rule in the Second Circuit, conflicts with the decisions of other courts of appeals that have not elaborated upon the "mere assertion" requirement. But those courts approved the "mere assertion" requirement only in cases where the defendant in fact made detailed allegations, see *United States* v. *Vielguth*, 502 F.2d 1257, 1258 (9th Cir. 1974); *United States* v. *Toscanino*, 500 F.2d 267, 270-271, 281 (2d Cir. 1974), or where the allegation of wiretapping was plausible on its face. See *In re Evans*, 452 F.2d 1239, 1250 (D.C. Cir. 1971), cert. denied, 408 U.S. 930 (1972).

App. A27). Since petitioner's allegations were conclusory and unsupported, the Assistant United States Attorney's statement was sufficient to support denial of his motion to suppress. See *United States* v. *Alvillar*, 575 F.2d 1316, 1321 (10th Cir. 1978); *In re Grand Jury Proceedings*, 643 F.2d 226, 228-229 (5th Cir. 1981).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

BRENDA GRUSS
Attorney

JANUARY 1984

---

[3]Moreover, the manner in which petitioner's drug smuggling scheme was discovered — by local officials after the plane caught fire following its unanticipated landing at Unadilla -- makes it exceedingly implausible to suppose that illegal electronic surveillance could have had any relation to the prosecution's case.